No. 13,226

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN PHILLIP WHITE,
Appellee.

APPELLANT'S REPLY BRIEF.

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STATEMENT.

Appellant at this time is taking the opportunity to answer and refute several of the arguments that appellee has raised in his brief. Appellant in this Reply Brief does not intend to answer all the points argued by the appellee. However, the government desires to specifically reply to several points raised by the appellee which are clearly contrary to the specifications of points relied upon on appeal as set forth in appellant's opening brief.

As to those points in appellee's brief that are not answered or replied to herein it is respectfully submitted that the appellant does not acquiesce or agree with the contentions or arguments of appellee as set

forth therein. As to those unanswered arguments, appellant relies upon its authorities and arguments as set forth in its opening brief.

WAS APPELLEE GUILTY OF CONTRIBUTORY NEGLIGENCE?

Appellant in its opening brief (Br. pp. 7-9) has asserted that the appellee in the instant case was guilty of contributory negligence and the contributory negligence on his part barred his recovery in the instant litigation. Appellee quite naturally has denied this contention on the part of the government (Br. pp. 15-17). Appellee asserts that he could not be guilty of contributory negligence by way of imputation from Pvt. Lang by reason of the fact that Pvt. Lang, although hired by Mr. White, was in fact not responsible to Mr. White but to appellee's employer, MARS METAL COMPANY. In support of this contention, appellee has cited section 2351 of the California Civil Code (Br. p. 16). Appellant in support of its position that Lang was an employee of White and, therefore, the negligence of Lang was imputed to White, respectfully directs the attention of the Honorable Court to the fact that appellee by his own testimony never disclosed to Lang or any other member of the military personnel whom he hired that he was working for the Mars Metal Company. The Court's attention is directed to the testimony of the appellee as follows:

> "I went to town and bought two sacks. I spoke to the executive officer telling him *I* was going

> to have to employ people and was there any objection to *my* hiring soldiers on their off time." (Tr. 113)

Appellee in his brief contends that his hiring of off duty personnel was for and in behalf of his employer (Br. p. 15). This assertion is inferential and not substantiated by the evidence and clearly contrary to the testimony of the appellee as set forth above. The evidence clearly discloses that White and White alone was doing the hiring of the military personnel to aid him in the collection of the scrap metal. The evidence is likewise lacking of any disclosures by White to these soldiers that he was working in behalf of another person or company. The Court's attention is respectfully directed to 61 ALR at pages 281-282 in the discussion of the agent's liability for acts of a subagent. The text states:

> "But, if the agent, having undertaken to do the *business* of his principle *employs* a servant or agent *on his own account to assist him* in what he has undertaken such a subagent is the *agent* of the agent and is responsible to the agent for his conduct and the agent is responsible to the principle for the manner in which the business is done." (Emphasis added.)

In accord with this principle, the record is clear that White was undertaking to do the business of his employer, Mars Metal Company. He employed Lang to assist him in removing scrap metal from the Camp Beale strafing range. In effect, this hiring resulted in Lang becoming an agent of White and

under the authority set forth in appellant's opening brief (Br. p. 89) the negligence of Lang was imputed to appellee barring his recovery in the instant action.

We must reassert our contention that the conduct of Lang towards White was negligent, irrespective of the argument to the contrary by appellee's brief (Br. pp. 15-17). The appellant's position is that Lang was negligent in the manner in which he handled the chunk of iron with White in close proximity is based upon the appellant's own testimony (Tr. pp. 121-122). This testimony of the appellee shows that White did not want the piece of metal, and so told Lang. Lang while he was "walking off" from White, "nevertheless * * * pitched" it at him. It is inconceivable to the appellant that this conduct of Lang was anything but negligent. When White told Lang that he did not want the metal that had been shown to him that should have ended the discussion. Lang had no further cause or reason to thereafter give the metal to White. Yet, after having been told that the metal was not of the type desired by the appellee, Lang pitched or tossed the metal to White while "walking off" from White (Tr. p. 122). Such conduct was not prudent on the part of Lang and his actions most assuredly were not motivated by a person having due concern for the safety and well-being of White, who was in close proximity to him.

We cannot agree with the trial Court's findings that such conduct on Lang's part was a normal or natural incident to the collection of scrap metal (Tr. p. 68). We must respectfully differ with this finding

and again reassert our position that Lang's conduct was negligent and being imputed to White on the basis of Lang acting as White's agent, constituted contributory negligence on the part of White barring recovery in the instant action.

WAS THE ACT OF LANG AN INTERVENING CAUSE?

Appellee in his brief (Br. pp. 17-22) goes into great length in asserting the negative of this proposition. The appellant cannot agree with this contention of the appellee. Likewise, appellant is not in accord with the trial Court's finding that no intervening cause arose relieving the United States of America from liability to appellee (Tr. p. 68 and Tr. p. 76). The appellee in his brief (Br. pp. 17-18) states with emphasis that Lang *handed* the 37 mm. projectile to White, citing appellee's testimony to that effect (Tr. p. 209). This assertion by the appellee is incomplete for the testimony of the appellee shows that Pvt. Lang either handed it or *tossed* it and White *"attempted to catch it as you would anything that is pitched to you or thrown to you."* (Tr. p. 209). It is clear from the testimony of the appellee himself that his argument that Lang handed the piece of metal to him is contrary to the evidence that Lang in fact threw the piece of metal at the appellee, while he was walking off from White (Tr. p. 122). Appellee in his brief has cited the case of *Northwestern National Insurance Company v. Rogers Pattern Aluminum Foundry,* 73 Cal. App. (2d) 442

as authority to refute appellant's argument that Lang's conduct towards White was an intervening cause relieving appellant from liability arising out of any negligence on the government's part, if any there was. Appellee has referred to the Court's decision in the *Northwestern National Insurance Company case* to uphold his position that the actions of Lang did not constitute an intervening cause because the appellant:

1. Should have realized that Lang might act as he did; and,

2. That appellant should not have regarded Lang's act as *highly extraordinary* under the then existing situation.

To say the least, Lang's conduct in tossing or pitching the chunk of iron at appellee after being told by White that he did not want the metal in question was anything but an ordinary act and was in fact conduct that was extremely and highly extraordinary.

Reasonably prudent individuals are not to be held to the foreseeability that people collecting scrap metal will toss it at one another after being told that the metal in question was not acceptable. From the evidence, it is clear that the appellant should not be held to the legal duty of realizing or anticipating that Lang would act as he did. Such a standard of care and foreseeability is untenable. Appellant must reassert its argument that the act of Pvt. Lang in tossing or pitching the metal to appellee actually operated to produce appellee's injuries, irrespective of whether

appellant was negligent or not prior thereto. (Rest. Torts, Sec. 441.)

Provin v. Continental Oil Company, 49 Cal. App. (2d) 417 at 424.

CONCLUSION.

In conclusion, appellant respectfully submits that contrary to the arguments of appellee, the Findings of Fact, the Conclusions of Law and the Judgment rendered by the Honorable Trial Court Judge are not in accordance with the facts of the law in this case, are set forth and argued by appellant in this closing brief and in its opening brief heretofore filed. It is respectfully submitted that the Judgment of the Trial Court in favor of the appellee should be reversed and an Order made and entered by this Appellate Tribunal entering judgment for and in favor of appellant.

Dated, San Francisco, California,
February 20, 1953.

Respectfully submitted,

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